



Memorandum

DATE: March 2, 2021
TO: Planning Commission
FROM: Cliff Strong, Senior Planner
THROUGH: Mark Personius, Director
RE: Continued Review of Shoreline Management Program (SMP) Periodic Update 2020

Tonight's Goals

On March 11th the Planning Commission will continue its review of the SMP Update.

During your last meetings you have requested that staff invite knowledgeable speakers regarding both flood control works and manure holding facilities, so we have lined up Paula Harris (Public Works Flood Division) to speak about the former and George Boggs (Whatcom Conservation District) to speak about the latter.

After hearing from them we will pick up where you left off and continue to review the proposed amendments to Exhibit F (Ch. 16.16, Critical Areas), in particular the suggested motions from Commissioner Maberry. Staff has reviewed these motions and we provide our analysis and responses below.

In case the Commission completes these discussions, we are also providing you the remainder of what needs to be reviewed before we schedule a public hearing, namely the amendments to Exhibit E (WCC Title 22, Permitting) and to Exhibit G (SMP Environment Designations Map), which are also discussed below.

Attachments

Exhibit E – Staff is providing the Commission with a revised version of Exhibit E (Title 22, Permitting), as we have made a few edits since the last version we provided you. These edits come from conversations with Department of Ecology staff, or correcting a few organizational and grammar issues we found. In each such instance, we have added a comment that begins “Note to P/C” so that you can clearly see what we changed (you can search for that clause). We are not listing each of those changes in this memo as we don’t think any of them are substantive.

Exhibit G – We are also providing you with a draft updated SMP Map.

All documents are available in pdf and Word versions on PDS’s SMP Update webpage:
<https://www.whatcomcounty.us/3119/SMP-Update-2020-Documents> .

Commissioner Maberry’s Proposed Motions to Exhibit F

Commissioner Maberry worked with wetland consultant Ed Miller to develop some recommended edits to the draft Exhibit F (Ch. 16.16, Critical Areas). These were distributed as draft motions to the Commission on 2/25/21, but given the short notice the Commission postponed discussion and asked staff to analyze and provide recommendations on them.

1. **16.16.225(D)** – Replace “associated with marine, river, or lake shorelines and wetlands” with “within designated critical areas and/or buffers.”

Reason Given: The proposed language could imply CAO requirements expand outside intended areas.

Staff Response: This new section is intended to address the SMA's requirement to preserve native plant communities associated with shorelines. Though shorelines are considered critical areas pursuant to 16.16.710, staff thought it would be easier for people to understand this rule by if we just call them out. Thus, this wouldn't expand CAO requirements outside of intended areas. Though it could be changed to read as suggested, it wouldn't have any effect on the regulation. The term "associated" refers to associated with... shorelines, as detailed in the WAC.

2. **16.16.255(C)(3)** – Strike this section.

Reason Given: WDFW already covers areas for habitat corridors and habitat for salmon and forage fish as Habitat Conservation areas (HCA's). This language will be redundant and run the risk of implying CAO requirements expand outside intended areas.

Staff Response: This language, along with other additions, was added to address the Commission's and Council's direction in the Scoping Document to "Consider strengthening ecological connectivity and wildlife corridor requirements" and "Consider ways to improve protections for salmon and forage fish habitat" (Items #8b and 8c). Though biodiversity areas, wildlife corridors, and WDFW Priority Habitats are designated as critical areas already, addressing them in critical areas assessments was often overlooked. The text was inserted as a reminder that – if there are any such features affected by a development proposal – they should be addressed in the assessment. It does not imply that CAO requirements would expand outside intended areas.

3. **16.16.630(C) / 16.16.720(A)(1)** – Retain the existing language "that are functionally and effectively disconnected from the wetland by an", remove "of", retain "road or other".

Reason Given: This will have substantial consequences for property owners, creating new buffers and non-conforming use in areas with no connectivity to priority habitats.

Staff Response: In 2005 the Department of Ecology released two volumes of Best Available Science: [Volume 1](#) was a synthesis of knowledge to date, and [Volume 2](#) addressed management recommendations. Searching for the word "disconnect" in Volume 1 and 2 or the appendices returns zero results. In [Appendix 8-C](#) "Guidance on Widths of Buffers and Ratios for Compensatory Mitigation for Use with the Western Washington Wetland Rating System" Ecology provides conditions when a buffer maybe reduced (see section 8C.2.4.2). Specifically, condition #2 addresses existing roads and other structures within buffers. The two examples in condition #2 are based on the framework of nonconforming uses and structures, in which new development cannot expand nonconformity. The first example provides reasoning why a 150-foot buffer would not expand across the existing road for new shoulder improvements, resulting in a 50-foot buffer. However, in the second example, where a new shopping center is proposed on the same road, although upland of the wetland, Ecology states the new shopping center would have adverse impacts on the wetland, and the buffer should include the 100 feet of buffer reduced in the first example; otherwise the nonconformity of the road would be increased by the new development. Ecology also gives the option of averaging the buffer. Staff's proposed language incorporates both examples by removing the existing road or structure from the buffer and retaining the remaining buffer. Staff has met with Ecology who concurred the language meets the guidance.

4. **16.16.640(A)(5) / 16.16.745(A)(2)** – Strike these sections.

Reason Given: Adjacent priority habitats are already accounted for in the wetland rating form and will likely result in a double counting towards buffer requirements.

Staff Response: The existing code already allows the Director to increase buffer widths, but with less guidance, which consultants are usually clamoring for. Thus, we “borrowed” language from Skagit County, which provides better detail on when the Director can do so. We don’t see how this would result in a double counting towards buffer requirements. In [Appendix 8-C](#) Ecology provides three conditions for increasing the buffer width (section 8C.2.5): 1) the buffer is not planted with plants native to the region; 2) slope; and 3) the presence of sensitive species (such as endangered or threatened). Ecology recommends increasing the buffer for the life history of the species present, and Appendix 8-G provides a table summarizing best available science for certain species. The wetland rating form provides for general presence/absence of priority species; however, the buffer associated with the rating is not specific to species present in the wetland.

5. **16.16.640(B)(2) / 16.16.745(B)(2)** – Strike these sections.

Reason Given: These new sections eliminate the intent of buffer averaging and only allows for it when combined with additional mitigation. This will increase the cost of simple projects and greatly reduce predictability when applying for a permit.

Staff Response: After reviewing this issue and the DOE guidance, staff recommends amending §16.16.640(B)(2). In 2005 the Department of Ecology released two volumes of Best Available Science: [Volume 1](#) was a synthesis of knowledge to date, and [Volume 2](#) addressed management recommendations. Ecology addresses buffer averaging in two locations, the first is in Volume 2 section 8.3.8.3 (Buffer Averaging) and the second, in greater detail, in [Appendix 8-C](#) (Guidance on Widths of Buffers and Ratios for Compensatory Mitigation for Use with the Western Washington Wetland Rating System). In Volume 2, Section 8.3.8.3, Ecology explains three reasons why buffer averaging is in the tool kit for protection of wetlands. The first and typical reason is to allow development to occur closer than usual to the wetland in order to fit a particular development “footprint” onto a given site. The second reason is protect a natural feature (e.g., a stand of trees or snags) that otherwise would fall outside of the standard buffer. And the third reason is to provide connections with adjacent habitats or to address those situations where pre-existing development has reduced a buffer area to a width less than the required standard.

In Appendix 8-C Ecology states “widths of buffers may be averaged if this will improve the protection of wetland functions or if it is the only way to allow for reasonable use of a parcel. There is no scientific information available to determine if averaging the widths of buffers actually protects functions of wetlands.” Ecology then proceeds to provide criteria for averaging a buffer: 1) It should not be reduced by more than ¼; 2) the area of the standard and averaged buffer are the same; and 3) the buffer is increased adjacent to the higher functioning buffer, and there is a distinct difference between the higher functioning and lower functioning buffers. The requirement for a high function and lower function buffer eliminates the use of averaging when the buffer is entirely degraded.

Thus, staff recommends that we amend the draft language to allow buffer averaging only when there is fully functioning and degraded habitat and add language that supports Ecology’s Guidance for allowing averaging to protect ecologically significant areas outside of the buffer or habitat connectivity. Section (B)(2) would read:

1. Averaging of required buffer widths will be allowed for the following when the dimensional standards of subsection (B)(1) are met:
 - a. To protect a natural feature (e.g., a stand of trees or snags) that otherwise would fall outside of the standard buffer.

- b. To provide connections with adjacent habitats or to address those situations where pre-existing development has reduced a buffer area to a width less than the required standard.

6. **16.16.640(C)(1)(c) / 16.16.745(C)(1)(c)** – Retain the existing language.

Reason Given: The proposed language does not take into account wetland category and eliminates larger buffer reduction potential for low value wetlands.

Staff Response: The maximum reduction of 75% through buffer averaging is based on DOE guidance.

7. **16.16.640(C)(1)(e)(iii) / 16.16.745(C)(1)(f)(iii)** – Strike proposed amendments.

Reason Given: The proposed language expands CAO authority to areas outside of critical areas, requiring retention of native vegetation outside of critical areas and their buffers.

Staff Response: This section does not expand CAO authority to areas outside of critical areas; it only provides a pathway to having narrower buffers (see response to item 5, above). The proposed subsections (e) & (f) provide three ways to for an applicant to minimize impacts and provide equivalent functions and values. Subsection (iii) of these subsections lists just one of the ways an applicant of a moderate impact land use project may apply low intensity buffer widths, which are narrower. An applicant need not do this if they don't want to reduce their buffers (the wider buffers would then apply).

8. **16.16.640(C)(3) / 16.16.745(C)(2)** – Strike proposed amendments.

Reason Given: The proposed language grants unlimited potential for mitigation requirements and will greatly reduce predictability in project cost and permit approval.

Staff Response: The planting of degraded buffers has been a part of our CAO since 2005 and is based on Best Available Science and DOE guidance. Based on case history, we are only clarifying that the area that might be enhanced is limited to the specific portions of the buffer being reduced, not anywhere on the lot, and certainly not outside critical area buffers (and thus does not “grant unlimited potential for mitigation requirements”). Per DOE guidance, “degraded” is any portion of a buffer that is not in a densely vegetated community. Ecology provides this requirement in Appendix 8C, Section 8C.2.5. to either increase the buffer or enhance with native vegetation. Ecology’s guidance for buffer size is based on science with a densely planted vegetative buffer.

9. **16.16.680(C)(4)** – Replace “the following ratios:” with “a 1:1 ratio / Strike (a. b. c.)

Reason Given: Mitigation (planting trees) is seasonal (fall through spring). Requiring higher mitigation ratios for previous impacts will likely delay project start dates. Regarding (c), many property owners may be unaware that their property lies within critical areas or their buffers and would be required to mitigate at a punitive ratio for past projects, even if it was performed by a previous owner. Meeting the no net loss provisions should be sufficient.

Staff Response: The amendments to this section are proposed to meet Best Available Science and DOE guidance to account for temporal loss, i.e., the time between impact and when mitigation is providing the same functions and values as to prior to the impact.

10. **16.16.710(C)(1)(a)(v)** – Replace “ all segments of aquatic areas that are not type S, F or N waters and that are physically connected to type S or F waters by an above-ground channel system, pipe, culvert, stream or wetland” with “natural ponds and lakes above 20 acres.”

Reason Given: None

Staff Response: The amendment to create Type O water is proposed so as to align Ch. 16.16 with the County's Manure and Agricultural Nutrient Management regulations (WCC Ch. 16.28), which prohibit "the spreading of manure within 50 feet of drainage ditches leading to rivers and streams." This is the code that our Pollution Identification and Correction (PIC) program uses to curtail the introduction of agricultural runoff into our waterways, thereby protecting our shellfish resources. Creating a Type O water with a 25-foot buffer was suggested by our PIC managers, the Whatcom Conservation District, the Department of Agriculture, and other partner agencies so that there's a buffer between where manure might be spread and our waterways. It was determined that 25-feet would be adequate for this function. Were we to revert to the existing code, then such waterways/ditches might be considered one of the other types with a larger buffer.

11. **16.16.740(B)**, Table 4 Type O Habitat Conservation Area Buffer Requirement – Change buffer from 25 ft. to 50 ft.

Reason Given: None

Staff Response: Though this is possible we don't recommend it, as most Type O waters are generally modified and as such do not need a large buffer to protect habitat.

12. **16.16.710(C)(1)(a)(vi)** – Add additional definition "Type P waters include natural ponds and lakes under 20 acres."

Reason Given: Proposed language is vague and could require buffers on ditches and artificial ponds.

Staff Response: What staff has proposed is based on the Department of Natural Resources' (DNR) Water Typing System (WAC 222-16-030) and we don't recommend altering it. Natural ponds and lakes under 20 acres already fall into one of the five listed types, which are generally based on size, permanence, and presence of fish. The state stream typing includes all waters which provide fish habitat, lakes and ponds provide fish habitat and are regulated as Type F.

13. **16.16.740(B)**, Table 4 Type P Habitat Conservation Area Buffer Requirement – Require buffer of 25 ft.

Reason Given: None

Staff Response: Lakes and Ponds are Type F waters. A 25-foot buffer would not meet Best Available Science from WDFW. Neither Table 4 nor the rest of the code lists a "Type P" HCA, so staff is a bit confused about this suggestion. If Commissioner Maberry meant "Type O" (just one key away from "P," so could be a typo), the buffer is already listed as 25 ft. for this water type in Table 4.

14. **16.16.760(E)** – Add "(area or function)" after "habitat conservation areas" / Replace "the following ratios" with "a 1:1 ratio" / Strike subsections 1, 2, & 3.

Reason Given: Mitigation (planting trees) is seasonal (fall through spring). Requiring higher mitigation ratios for previous impacts will likely delay project start dates. Regarding (c), many property owners may be unaware that their property lies within critical areas or their buffers and would be required to mitigate at a punitive ratio for past projects, even if it was performed by a previous owner. Meeting the no net loss provisions should be sufficient.

Staff Response: This (mostly) existing section was adopted by Council to meet Best Available Science and DOE guidance to account for temporal loss, i.e., the time between impact and when mitigation is providing the same functions and values as to prior to the impact. It is not to require property owners to mitigate for past impacts caused by a previous owner. Subsection (E)(3), which could be viewed as, and

indeed is intended to be punitive, is proposed as a penalty for those who choose not to go through the permitting process and get caught.

Amendments to Exhibit E (Title 22, Permitting)

(Note: Topic #s refer to the topic number assigned in the Scoping Report)

#9, Layout and Structure of the SMP

- a) Reorganize the SMP, putting the background information, discussions, and goals and policies into the Comprehensive Plan as a chapter**

One of the organizational changes is to move all permitting regulations to WCC Title 22. Title 22 was created a few years ago to eventually contain all of the County's procedures for land use permitting and code administration. However, moving sections to this Title is continuing to occur as we progress through various code amendments (e.g., the annual code scrub, upcoming code enforcement amendments, this SMP update, etc.).

#1, Consistency with State law (required amendments)

- a) Revise language to cite updated substantial development cost threshold or to rely solely on reference to WAC 173-27-040 for exemptions to substantial development permitting.**

The Office of Financial Management (OFM) recalculates the dollar threshold for projects qualifying as exempt from having to obtain a substantial development permit process every 5 years. Staff considered deleting the dollar amount in §22.07.020(B)(1) and just referring to the most recent OFM updated amount, but felt it might be difficult for the public to track it down. Instead, the amount shown in the code has been updated to the most recent (2017) OFM calculation of \$7,047. Note, though, that PDS updates its permit application, website, and handouts to reflect OFM's newest threshold amount whenever it's published.

- c) Add reference to statutory exceptions to local review to the SMP. Revise or remove existing references to remedial actions and projects certified pursuant to RCW 80.50 to clarify their status as exceptions to local review under the SMA.**

The requisite language has been added (and revised) to §22.07.010(G) to clarify the referenced project types' status as exceptions to local review under the SMA, and deleted from (old) §23.50.060 (Exhibit D).

- d) Revise language to include shoreline permit exemption for retrofitting existing structures to comply with the ADA or to rely solely on reference to WAC 173-27-040 for exemptions to substantial development permitting.**

The requisite language has been added as §22.07.020(B)(17) (Exhibit E).

- e) Revise language in the SMP to cite the updated cost thresholds for dock construction or to rely solely on reference to WAC 173-27-040 for exemptions to substantial development permitting.**

§22.07.020(B)(8) has been revised to meet the statutory requirements and the cost threshold has been deleted from e definition of "substantial development" in §23.60.190 (Exhibit D).

#2, Consistency with State law

- a) Revise the SMP for consistency with Ecology's updated permit filing procedures.**

The requirements for filing permits with DOE have been updated in §22.07.060 (Filing Shoreline Permits with the Department of Ecology).

- e) Define special procedures for WSDOT projects per WAC 173-27-125.**

Subsection (1)(c) has been added to §22.05.130 (Permit Review Time Frames) to define special procedures for WSDOT projects. (Exhibit E)

#4, Consistency with Land Use procedures (Title 22)

- a) Update SMP to align with recently adopted Title 22 permit procedures.**

All permitting procedures formerly in Title 23 (Exhibit D) have been moved to Title 22. Where processes overlap with PDS's other project permit types, we refer to and rely on (slightly modified) existing language (Ch. 22.05). However, shoreline permits also have requirements unique to them, so have supplemented the processing rules with a new Ch. 22.07 (Additional Requirements for Shoreline Permits and Exemptions).

#5, Consistency with Shoreline Management Act (RCW 90.58) and 2003 SMP Update Guidelines (WAC 173-26)

- c) Align appeal procedures with State statutes.**

Subsection (3) has been added to §22.05.160 (Appeals) to align the County's shoreline permit appeals process with the state statutes.

- d) Shoreline permit review (Exemption, Substantial, Conditional Use, or Variance) should reflect State statutes and level of review required.**

The rules for shoreline permit review have been updated to meet state standards in Ch. 22.07.

- f) Incorporate improved permit streamlining for priority salmon recovery projects**

§22.07.020 (Exemptions from Shoreline Substantial Development Permits) subsection (B)(16) already exempts projects whose primary purpose is to improve fish or wildlife habitat or fish passage.

#17, Shoreline Uses

- a) Revise as necessary any SMP policies or regulations pertaining to the Cherry Point area as directed by Council.**

In 2018 the Council started a process of amending the policies and regulations related to fossil fuel facilities in the Cherry Point Management Area. They hired consultants specifically for this task, which is principally being administered under a separate process. Under that separate process, the Commission has already reviewed their amendments to C/P Ch. 2 (Land Use) and WCC Ch. 16.08 (SEPA) and none of those amendments affects the documents the Planning Commission is reviewing as part of this SMP Update. The Council's amendments to Title 22, however, have been incorporated into Exhibit E, and are being show as new as they are not yet adopted. We have also incorporated the Commission's recommended changes to this specific language, also flagged by comments in the document.

Official Shoreline Environment Designation Map

Staff has updated the Shoreline Environment Designation Map as follows:

- UGA and City boundaries have been updated.
- On the Lummi Nation, parcels that have been put under Tribal jurisdiction since the last update were updated with the “Tribal” shoreline designation.
- Designations were adjusted, where necessary, to match the updated and spatially corrected parcel boundaries. This was just a housekeeping task and no designations were changed.
- Shoreline jurisdiction was expanded to rightly include all areas of the floodway, as per code. This primarily expanded the Resource designation on the Nooksack from Ferndale to Lynden and portions of the South Fork of the Nooksack. Floodway and Floodplain are differentiated in the database.
- The complex of beaver ponds north and south of H Street Road between Sunrise and Markwork Roads (NE of Lynden) were added to the Conservancy designation. These ponds have grown in size and now surpass the 20-acre threshold for being a Water of the State. Since these ponds were identified and characterized in the 2007 Characterization report, we do not need to update that report; the data is still valid.
- Shoreline designation breaks (thick black bars) have been removed from the map as they made it difficult to read.
- At the request of the owners of APN 390302-428076-0000, 390302-485039-0000, and 390302-440200-0000 we have removed the Resource environment designation from a mining pond located to the NW of the intersection of E. Pole X Everson-Goshen Roads, just southeast of Everson. This designation was applied during the last SMP update, but has been determined to have been an error. Though it is a waterbody greater than 20 acres, it is a mineral extraction pond and DOE guidance is that such ponds do not qualify as a Water of the State until mineral extraction is complete and the restoration plan is realized. Once that happens, it automatically is designated as Conservancy under state law and our SMP. The County would then have 3 years to amend the map and finalize its designation.